Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1998

HOMER W. WALKER,

Petitioner,

v.

NATIONSBANK, JOE TEMPLE, C. KIM NAZARCHYK, and FAYE MCDANIEL,

Respondents.

On Petition for Extraordinary Writ to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR EXTRAORDINARY WRIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court lack subject matter jurisdiction, pursuant to 28 U.S.C. § 1441 (b) over a Cumberland County, North Carolina, Superior Court civil action, where petitioner relied solely on state law, that was removed to federal court by defendants, where there is no diversity of citizenship, the defendants are not state actors, and the governments was not involved in the activity that caused the injury?

2. Did the United States District Court abuse its discretion when it denied petitioner's motion to remand petitioner's state law claim back to state court, and rendered petitioner's motion to remand moot?

3. Did the United States District Court abuse its discretion when it denied petitioner's Rule 60 motion, to set aside its order rendering petitioner's motion to remand moot, and then enter an order barring petitioner from re-litigating his state law claim in state court or federal court, when federal jurisdiction did not otherwise exist?

4. The Fourth Circuit Court of Appeals has denied petitioner mandamus relief in this case, to remand petitioner's state law claim back to state court. Is that denial so contrary to federal law and so self-contradictory that this court should exercise its power of supervision and reverse the Fourth Circuit?

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HOMER W WALKER,

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NATIONSBANK, JOE TEMPLE, C. KIM NAZARCHYK, AND FAYE MCDANIEL,

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Petition for an Extraordinary Writ to the United States District Court for the Eastern District of North Carolina

---

Petitioner respectfully prays that an Extraordinary Writ issue to review the judgment below.

OPINIONS BELOW

1. On May 23, 1996, the Honorable Jack A. Thompson, a Cumberland County Superior Court Judge, entered an order pursuant to Rule 41 (b) of the North Carolina Rules of Civil Procedure for involuntary dismissal without prejudice to the right of petitioner Homer W. Walker, to re-file his state-law claim in Cumberland County Superior Court as he deem fit. The order of Judge Thompson is set out in Appendix – A.

2. On April 29,1997, the Honorable W. Earl Britt, a United States Judge, entered an order dismissing petitioner's first re-

filed claim from federal court for lack of subject matter jurisdiction. The order of Judge W. Earl Britt is set out in Appendix – B.

3. On December 19, 1997, United States Judge Terrence W. Boyle entered an order pursuant to Rule 41(b) of the Federal Rules of Civil Procedure dismissing petitioner's second re-filed claim from federal court, and; barring petitioner from re-litigating the action, and rendering petitioner's motion to remand the claim back to Cumberland County Superior Court moot. The order of Judge Boyle is set out in Appendix – C.

4. On November 26, 1998, United States District Court judge Terrence W. Boyle entered an order denying petitioner's Rule 60 motion and: ordered petitioner to show cause why petitioner should not be ordered to pay a penalty of $1,000 to the court. Judge Boyle further directed the Clerk of Court not to accept any filing from the petitioner other than one showing cause why sanctions should not be imposed. That order of Judge Boyle is set out in Appendix – D.

5. On January 10, 1999, United States District Court Judge Terrence W. Boyle entered an order denying petitioner's request to reconsider the November 26, 1998 order, and permanently enjoined petitioner from filing, commencing, or attempting to initiate any new action or proceeding and ordered the Clerk of Court to take such action as necessary to implement the pre-filing injunction. This order is set our in Appendix – E.

6. On January 13, 1999, the District Court entered its final judgment. That judgment is set out in Appendix – F.

7. The opinion of the Fourth Circuit Court of Appeals denying petitioner mandamus relief is set out in Appendix – H.

JURISDICTION

This court has jurisdiction over this petition for an extraordinary writ, as authorized by 28 U.S.C. § 1651 (a). This petition is filed in accordance with Supreme Court Rule 20.1. On June 1, 1999 the Fourth Circuit Court of Appeals denied petitioner mandamus relief, by unpublished per curiam opinion. The exceptional circumstance of this petition warrants the exercise of this court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Constitutional violation of the fourteenth amendment equal protection clause which guarantees that all person(s) circumstances, similarly situated, shall be treated alike, to include access to the courts for civil redress as well as denial of due process and obstruction of justice.

STATEMENT OF THE CASE

1. Petitioner properly filed a civil action against NationsBank, Joe Temple, C. Kim Nazarchyk, and Faye McDaniel in the Superior Court Civil Division of Cumberland County, North Carolina, on June 6, 1995. The claims consisted of: racial discrimination, false statement, false arrest and detention, and false imprisonment, causing petitioner loss of liberty and property. Respondents properly responded within the 30-day time frame. Attached to respondent's answer was a motion to dismiss, pursuant to Rule 12 (b) (6), and a motion for summary judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

2. On November 13, 1995, oral arguments were heard before the Honorable Cy A. Grant regarding petitioner's claim and defendant's motion to dismiss and motion for summary judgment. As a result of that hearing, the Honorable Cy A. Grant denied the defendant's motion to dismiss and motion for summary judgment.

3. On December 7, 1995, at the trial setting conference, a trial by jury date was set for May 20, 1996.

4. On May 20, 1996, when the case was called for trial by jury, petitioner was involuntarily confined and unable to appear in court to prosecute the matter. Based on the fact that petitioner was involuntarily confined, the court entered an order pursuant to Rule 41 (b) of the North Carolina Rules of Civil Procedure for involuntary dismissal without prejudice to the right of the petitioner to re-file his claim as he deem fit.

5. On November 18, 1996, pursuant to the order of Judge Jack Thompson, petitioner re-filed his claim in Cumberland County Superior Court.

6. On December 12, 1996, defendants removed petitioner's claim to federal court, pursuant to Rule 28 U.S.C. § 1441 (b).

7. On April 29, 1997, the Honorable W. Earl Britt dismissed the matter from federal court for lack of jurisdiction.

8. On May 6, 1997, petitioner again re-filed his state law claim in Cumberland County Superior Court, pursuant to the order of Judge Thompson.

9. On June 4, 1997, the defendant's again removed petitioner's state court action to federal court, pursuant to Rule 28 U.S.C. § 1441 (b). This second removal appears on the federal court docket under file no. 5:97-CV-450-BO (2).

10. On July 1, 1997, petitioner filed a motion to remand his state court action back to state court.

11. On July 8, 1997, defendants filed a motion to dismiss and a motion for anti-suit injunction.

12. On December 19, 1997, the court entered an order rendering petitioner's motion to remand as moot, dismissing petitioner's claim and barring petitioner from re-litigating his civil action in state or federal court.

13. On September 15, 1998, petitioner filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure to set aside the judgment order entered on December 19, 1997, together with supporting memorandum of law requesting that the matter be remanded back to state court.

14. On November 26, 1998, the court entered an order denying petitioner's Rule 60 motion, and ordered the petitioner to show cause as to why the court should not order the petitioner to pay a penalty of $1,000 to the court for filing the Rule 60 motion. Further, the Clerk of Court was directed not to accept any further filings from the petitioner, other than the one showing cause as to why sanctions should not be imposed on petitioner.

15. On December 4, 1998, in keeping with the order of the court, petitioner filed a motion to show cause and requested that the court reconsider its order denying petitioner's Rule 60 motion.

16. On January 10, 1999, the court entered its order in the show cause motion. The court imposed a non-financial sanction on the petitioner and placed the petitioner under a pre-filing injunction, permanently enjoining the petitioner from filing, commencing, or attempting to initiate any new lawsuit, action, proceeding, or matter in federal court and directed the Clerk of Court to take such actions as are necessary to implement the pre-filing injunction.

17. On March 4, 1999, petitioner filed motion for mandamus pursuant to 28 USC § 1361 in the Fourth Circuit Court of Appeals. In petitioner's motion for mandamus, petitioner set out specific duty owed to petitioner. The verbatim motion for mandamus, is set out in Appendix – G.

18. On June 1, 1999, the Fourth Circuit Court of Appeals, in an unpublished per curiam opinion, denied petitioner's motion for mandamus relief. That opinion is set out in Appendix – H.

REASON FOR GRANTING AN EXTRAORDINARY WRIT

1. Petitioner's claim is well-grounded in state law and fact, and shows on its face the lack of federal jurisdiction or federal question. The fact that the defendants were seeking to remove a state action to federal court seeking a federal defense has been put to bed by several of the United States Appeal Courts and most recently by the United States Supreme Court, which is the law of the land. In the instance of this case, despite the fact that the defendant's tried to restate the petitioner's claim into claims that required interpretation of federal law, federal jurisdiction did not exist. The case law is well-settled on the fact that the plaintiff is the master of his claim – Thomas V. North Carolina Department of Human Resources (N.C.D.H.R.) is illustrative on this point. In the Thomas case, the plaintiff filed a complaint in 1991 against the N.C.D.H.R. in Guilford County Superior Court, alleging the N.C.D.H.R. denial of her application for food stamps violated the Food Act. The Superior Court upheld the denial of the plaintiff's application. The plaintiff then appealed to the North Carolina Court of Appeals. The North Carolina Court of Appeals reversed the decision of the trial court and remanded for summary judgment in favor of the plaintiff. The N.C.D.H.R. then attempted to circumvent the North Carolina Court of Appeals ruling. The Secretary of the United States Department of Agriculture intervened in his official capacity and removed the case to federal court. Upon removal, the United States District Court for the Middle District of North Carolina, Greensboro Division, held that:

"The plaintiff is the master of his claim, and thus if the plaintiff chooses not to assert a federal claim, the defendant cannot remove on the basis of a federal question, even if the plaintiff could have asserted a federal claim." U.S. Chief Judge Bullock also held that: 1) the Secretary of Agriculture, named as defendant in his

official capacity cannot remove case under officer removal statute, and 2) The plaintiff's claim did not present federal question and the District Court lacked subject matter jurisdiction. He then remanded the case back to state court. Thomas V. North Carolina Department of Human Resources, 898 F. Supp. 315 (M.D.N.C. 1995).

2. The defendants cannot, merely by injecting a federal question into an action that asserts what is plainly a state claim, transform the action into one arising under federal law. Further, in the instance of the original case, federal jurisdiction never existed. Caterpillar, Inc. V. Cecil Williams is illustrative on this point. In the case of Caterpillar, the plaintiff filed an action against the defendant in California State Court. Based totally on state law, the defendants removed the action to the United States District Court for the Northern District of California, and argues that this removal was proper. The District Court held that removal was proper and dismissed the case. The plaintiff appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's dismissal and held that:

"1) The case was not removable to federal court because the plaintiff's state-law claims were not grounded upon rights or liabilities created by the collective bargaining agreement. 2) The defendant's claim that its collective bargaining agreement with the union superseded all previous individual employment contracts was irrelevant and a defensive allegation."

On Certiorari, the United States Supreme Court affirmed the actions of the Court of Appeals. The Supreme Court held that:

1) Removal of causes from state to federal court is authorized only where original federal jurisdiction exists, 2) a case may not be removed from state to federal court on the basis of a federal defense, including the defense of

preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. The Supreme Court further held that: **3) the plaintiff is the master of his claim. If he chooses to have the case heard in state court, a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action into one arising under federal law, thereby selecting the forum under which the claim shall be litigated. If the defendant could do so, then the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.** Caterpillar, Inc. V. Williams, 96 L Ed 2d 318, 107 S Ct.

3. The order of the Honorable Terrence W. Boyle, entered on December 19, 1997, rendering petitioner's motion to remand moot, cannot act as a defense for the defendants to bar the court from remanding this action back to state court or to bar the court from granting the petitioner's Rule 60 motion. The case of Rose M. Carpenter V. Wichita Falls School District, is illustrative on this point. In the case of Carpenter, the plaintiff brought federal action alleging First Amendment violation and state action alleging breach of contract and violation of free speech rights under the state Constitution against the school district.

The school district removed the state case to federal court and the cases were consolidated. The United States District Court for the Northern District of the state of Texas denied the plaintiff's motion to remand the case to the state courts. The plaintiff then appealed this decision to the 5th Circuit Court of Appeals., That court held that: **1) The plaintiff's state complaint was not federal in character and the District Court lacked subject matter jurisdiction over the complaint**, and **2) Because the effect of removal is to deprive the state court of action properly before it,**

defendants may not remove on the basis of anticipated or even inevitable federal defense, but instead must show that federal right is an element, and an essential one, of the plaintiff's cause of action, because removal raises significant federalism concerns. The Appeals Court then reversed the District Court's denial of Carpenter's motion to remand and remanded the case to the state court for further action. Rose. M Carpenter V. Wichita Falls School District. 44 F 3d 362 (5th Cir. 1995).

4. Judge Boyle also asserts in his order dated December 1. 1998 that petitioner had filed four identical lawsuits in Cumberland County, North Carolina. Superior Court, that three of those lawsuits were removed to federal court by the defendants, and that he dismissed the petitioner's third lawsuit which was removed to federal court by the defendants based on the doctrine of Res Judicata on April 3, 1998.

Federated Department Stores, Inc. V. Moitie is illustrative on this point. In the case of Moitie, several parallel civil actions were subsequently filed by private plaintiffs seeking treble damages. Each complaint tracked almost verbatim the allegations, the parties, the place and time that the infraction occurred. Each plaintiff filed his complaint in state court. Each of these complaints tracked almost verbatim the allegations of the governments, though the Moitie complaint referred solely to state law. All of the actions originally filed in the District court were assigned to a single Federal Judge, and the Moitie case was removed there on the basis of diversity of citizenship and federal question of jurisdiction. The District Court dismissed all of the actions in their entirety. Plaintiff in five of the suits appealed this judgment to the Court of Appeals. Counsel representing Moitie chose not to appeal and instead re-filed the Moitie action in state court.

The defendants removed the new action to federal court and moved to have it dismissed on the grounds of *res*

judicata. The District first denied the plaintiff's motion to remand. It held that in many respects the plaintiff's state law claims were identical to the prior complaint and thus the removal was proper. The court then concluded that because Moitie's new action involved the same parties and the same time periods, the doctrine of *res judicata* required that Moitie's new action be dismissed. When Moitie's case finally came before the Court of Appeals for the Ninth Circuit, the court reversed the decision of the District court dismissing the case. Federated Department Stores, Inc. V. Moitie, 69 L Ed 2d 103, 101 s Ct.

5. The fact that the defendants have attempted to restate petitioner's state law claim to raise a federal question, seeking a federal defense by removing petitioner's claim to federal court was recently put to bed by the United States Supreme Court in Rivet V. Regions Bank of Louisiana. In the case of Rivet, several individuals brought suit in a Louisiana state court against defendants including a bank, relying exclusively on Louisiana state law. The dispute involved only Louisiana parties. The defendants removed the case to the United States Court for the Eastern district of Louisiana on the basis of the defendant's assertion that the individual's action was precluded by some prior order of a federal bankruptcy court. The plaintiff filed a motion to remand the case back to state court. The District court denied the plaintiff's motion to remand and expressed the view that 1) the prior bankruptcy order completely precluded the plaintiff's cause of action, and 2) that this complete preclusion made removal of the case proper.

On appeal, the Appeals Court affirmed the District Court's ruling. The Court of Appeals then denied a panel rehearing and rehearing en banc. On Certiorari, the United States Supreme Court reversed this decision and remanded the case to state court. In an opinion written by Justice Ginsburg, the Court held that **even though § 1441 (b)**

provides for the removal of a case when a plaintiff's complaint alleges a claim arising under federal law, it was improper to remove under § 1441 (b) the case at hand from Louisiana state court to the District court on the basis of the defendant's assertion concerning the prior bankruptcy orders, because claim preclusion by reason of a prior federal judgment, also known as *res judicata*, is a plea that provides no proper basis for removal under § 1441 (b).

The Court then reversed and remanded. Mary Anna Rivet V. Regions Bank of Louisiana, 139 L Ed 3d 912, 118 s Ct.

6. In Shamrock Oil & Gas Corporation V. Sheets, this court held that: **so long as state court remains the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law. It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff could have asserted a federal claim based on the same set of facts underlying his state claim.** Shamrock Oil & Gas Corporation V. Sheets, 85 L Ed 1214, 61 S Ct. 868 (1941).

7. Respondents, in the instance of this case, did not and do not qualify as state actors. Hicks V. Southern Maryland Health Systems Agency is illustrative of this point. As a general rule, courts should hesitate to bind private individuals and entities as state actors. Constitutionalizing private conduct imposes tremendous burdens on individuals and greatly diminishes their personal freedoms. Courts find state action only after considering "1) the extent and nature of public funding to the institution. 2) the extent and nature of regulation on the institution. 3) whether the institution's activity constitutes a public function in the 'exclusive prerogative' of the state. and 4) whether there is a 'symbiotic

relationship' between the institution and the state." Hicks V. Southern Maryland Health Systems Agency, 737 F. 2d 399, 402 (4th Cir. 1984). Clearly defendants do no qualify as state actors under this test.

8. The equal protection clause of the Fourteenth Amendment guarantees that all person(s) circumstanced similarly situated shall be treated alike. "[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state." Jackson V. Metropolitan Edison Company, 419 U.S. 345, 350 (1974). Additionally, "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon the plaintiff, but with the activity that caused the injury." Fletcher V. Rhode Island Hospital Trust National Bank, 496 F. 2d 927,932 (1st. Cir), 419 U.S. 1001 (1974) (Holding bank not to be state actor despite close regulation by state and federal governments.) In the instance of this case, plaintiff's complaint does not allege a sufficient nexus between government regulation and the purported actions of the defendants to create state action.

Conclusion

Petitioner's claim is a state law claim which should properly be tried in state court. Whereas at a hearing on this matter on November 13, 1995, in Cumberland County Superior Court, Fayetteville, North Carolina, the Honorable Cy A. Grant denied the defendants' motion to dismiss and denied the defendants' motion for summary judgment. Further, on May 23, 1996, the Honorable Jack A. Thompson entered an order pursuant to rule 41 (b) of the North Carolina Rules of Civil Procedure granting involuntary dismissal without prejudice to the right of the petitioner to re-file his action against the defendants as he deem fit.

The involuntary dismissal was also without prejudice to the defendants right to assert all defenses available to them. however. removal to a federal court was not and is not a defense that was available to the defendants. in this action. The defendants were not state actors. The action that formed the basis of the petitioner's grievance did not occur under color of law. The Fourteenth Amendment erects no shield against merely private conduct Shellev V. Kraemer. 334 U.S. 1. 13 (1948).

The equal protection clause of the Fourteenth Amendment guarantees that all persons similarly circumstanced shall be treated alike. Rodriguez V. Holmes. 963 F. 2d 799 (5th Cir. 1992). Moss V. Clark. 886 F. 2d 686. 691 (4th Cir. 1989).

Quoting Plver V. Doe. 457 U.S. 202. 216 (1982). as a matter of law and the equal protection clause of the Fourteenth Amendment. which guarantees that all persons similarly circumstanced shall be treated alike. and specifically in keeping with the Supreme Court's decision in the case of Rivet V. Regions Bank of Louisiana. petitioner respectfully requests that this petition for an extraordinary writ be granted. thereby reversing the District court's denial of petitioner's motion to remand. as well as the District courts order barring petitioner from re-litigating his state law claim in state court. This action would remand the petitioner's state law claim back to Cumberland County Superior Court. from which it was unlawfully removed.

The Fourth Circuit Court of Appeals ruling in this case is directly opposite to decisions of its own rulings. in Hicks v. Southern Marvland Health Systems Agency. 737 F. 2d 399. 402 (4th Cir. 1984) and in Moss v. Clark. 886 F. 2d 686. 691 (4th Cir. 1989). as well as rulings in (1st Cir.). (5th Cir.). and most recently. the decision of the ruling of this

court in Mary Anna Rivet v. Regions Bank of Louisiana, 139 L Ed 3d 912, 118 S Ct.

This petition for an extraordinary writ should be granted.

Respectfully submitted

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